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Lim Ban Hooi & Anor v Malayan Banking Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)–842–05 OF 2016
HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA
18 APRIL 2018

C *Limitation — Charge — Application for order for sale of charged land — Whether action to enforce charge of land was barred after expiration of 12 years from date when right to receive money secured by charge accrued — Whether 12 years did not begin to run only after expiry of period given to chargor in Form 16D notice under National Land Code to remedy breach — Whether 12 years started*
D *running upon expiry of one month after breach or such alternative period as might be specified in charge — National Land Code s 254(1) — Limitation Act 1953 s 21(1)*

The appellants created two charges over a piece of land in favour of the
E respondent's predecessor in title ('the bank') to secure credit facilities that were granted to them. When the appellants defaulted in their repayment obligations, the bank issued them notices of demand on 15 April 1998 and 20 May 1998. The bank then terminated the facilities, sued the appellants in a civil action and simultaneously sought to obtain an order for sale of the charged
F property. For that purpose, the bank issued a Form 16D notice to the appellants under s 256 of the National Land Code ('the NLC') on 27 September 1998. After holding a land inquiry, the land administrator granted an order for sale on 6 May 1999. On appeal, the High Court set aside that order with liberty to apply for a fresh order for sale. After its appeal against the High
G Court's decision was dismissed by the Court of Appeal ('COA') in June 2004, the bank took no further action on the matter. When the present respondent ('MBB') took over the assets of the bank pursuant to a vesting order, it issued a fresh notice of demand to the appellants followed by a fresh Form 16D notice on 22 February 2010. When the appellants did not respond to the said notices,
H MBB applied for an order for sale of the charged property. The appellants appealed to the High Court arguing, inter alia, that MBB's right to file a charge action had become time-barred under s 21(2) of the Limitation Act 1953 ('the LA'). They argued that since the default/breach under the facilities occurred in April or May 1998 and the bank had acted upon the breach by issuing notices
I of demand and a Form 16D in 1998, the 12 year period within which a charge action should have been filed started running from 1998 and expired in 2010. MBB countered by saying that it was entitled to issue a fresh Form 16D notice and that the 12 year time period only began running after the expiry of the one month given in that notice for the appellants to remedy the breach; that since

the Form 16D notice was issued on 12 March 2012, the application for an order for sale was not barred by s 21(2) of the LA. The High Court agreed with MBB and dismissed the appellants' appeal. In deciding the instant appeal against that decision, the COA relied upon the views and conclusions it had expressed in its earlier decision in *Sivadevi a/p Sivalingam v CIMB Bank Bhd* [2018] 5 MLJ 82 ('Sivadevi') where the interpretation and construction of s 21 of the LA (in particular ss 21(1) and (2)), Part 16 of the NLC and O 83 of the Rules of Court 2012 relating to charge actions were exhaustively considered. Inter alia, Sivadevi held that: (a) an action to enforce a charge of land fell under s 21(1) and not s 21(2) of the LA; (b) such an action became time-barred after the expiration of 12 years from the date when the right to receive the money secured by the charge accrued; (c) the 12 years began to run upon the expiry of one month after the breach or such alternative period as might be specified in the charge (the words occurring in s 254(1) of the NLC); and (d) it was wrong to hold that the 12 years ran only from when the chargor failed to remedy the default or breach as specified in the Form 16D notice because that would not only render the aforesaid words in s 254(1) of the NLC meaningless but result in time not running until a chargee had issued the Form 16D notice. In such an event, a chargee could well decide not to do anything for years and still be in time when it decided to enforce its right to an order for sale.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) On the strength of *Sivadevi* and for the reasons stated in that case, this appeal had to be allowed. The facts in the present appeal fortified the views held in *Sivadevi*. In the instant case, MBB's predecessor in title had not only recognised the breach and default that gave rise to the right to exercise the statutory remedy of an order for sale of the charged property; it had also exercised and acted on that right. That right did not and could not exist in a vacuum, isolated from the underlying contractual agreements reached between the parties. Even the NLC recognised those express agreements in ss 249 and 253. Having recognised the breach and the default that gave rise to the cause of action to enforce the charge by way of an order for sale, MBB was now estopped from suggesting otherwise (see paras 19 & 24).

(2) The order for sale in the present appeal was clearly time-barred under s 21 of the Limitation Act 1953. The appellants had amply shown 'cause to the contrary' within the terms of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (see para 25).

[Bahasa Malaysia summary

Perayu-perayu membentuk dua caj ke atas sebidang tanah memihak pendulu dalam hakmilik responden ('bank') untuk menjamin kemudahan kredit yang diberikan kepada mereka. Apabila perayu-perayu mengingkari tanggungjawab membayar semula, bank mengeluarkan notis tuntutan pada 15 April 1998 dan

20 Mei 1998. Bank tersebut kemudiannya menamatkan kemudahan tersebut, menyaman perayu-perayu dalam tindakan sivil dan serentak memohon untuk mendapatkan perintah untuk jualan terhadap hartanah yang dicaj. Bagi tujuan tersebut, bank mengeluarkan notis Borang 16D kepada perayu-perayu di bawah s 256 Kanun Tanah Negara ('KTN') pada 27 September 1998. Selepas menjalankan siasatan tanah, pentadbir tanah memberikan perintah jualan pada 6 Mei 1999. Atas rayuan, Mahkamah Tinggi mengetepikan perintah tersebut dengan kebebasan untuk memohon bagi perintah jualan baru. Selepas rayuannya terhadap keputusan Mahkamah Tinggi ditolak oleh Mahkamah Rayuan ('MR') pada bulan Jun 2004, bank tidak mengambil tindakan selanjutnya ke atas perkara tersebut. Apabila responden sekarang ini ('MBB') mengambil alih aset bank berikutan perintah letakhak, ia mengeluarkan notis tuntutan baru kepada perayu-perayu diikuti oleh notis Borang 16D baru pada 22 Februari 2010. Apabila perayu-perayu tidak respons kepada notis tersebut, MBB memohon untuk perintah jualan hartanah yang dicaj tersebut. Perayu-perayu merayu kepada Mahkamah Tinggi dengan berhujah, antara lain, bahawa hak MBB untuk memfailkan tindakan caj telah dihalang di bawah s 21(2) Akta Had Masa 1953 ('Akta'). Mereka berhujah bahawa memandangkan pengingkaran/pelanggaran di bawah kemudahan berlaku pada bulan April atau Mei 1998 dan bank telah bertindak ke atas pelanggaran dengan mengeluarkan notis tuntutan dan Borang 16D pada tahun 1998, tempoh 12 tahun dalam mana tindakan caj patut difailkan mula berjalan dari tahun 1998 dan tamat pada tahun 2010. MBB membalas dengan menyatakan bahawa ia berhak untuk mengeluarkan notis Borang 16D baru dan bahawa tempoh masa 12 tahun hanya mula berjalan selepas tamat satu bulan yang diberikan di dalam notis tersebut untuk perayu-perayu meremedi pelanggaran tersebut; bahawa memandangkan notis Borang 16D dikeluarkan pada 12 Mac 2012, permohonan untuk perintah jualan tidak dihalang oleh s 21(2) Akta. Mahkamah Tinggi bersetuju dengan MBB dan menolak rayuan perayu-perayu. Dalam memutuskan rayuan ini terhadap keputusan tersebut, MR bergantung ke atas pandangan dan kesimpulan yang ia nyatakan di dalam keputusannya terdahulu dalam kes *Sivadevi a/p Sivalingam v CIMB Bank Bhd* [2018] 5 MLJ 82 ('Sivadevi') di mana taksiran dan penggubalan s 21 Akta (terutamanya ss 21(1) dan (2)), Bahagian 16 KTN dan A 83 Kaedah-Kaedah Mahkamah 2012 berkaitan kepada tindakan caj telah dipertimbangkan secara keseluruhannya. Antara lain, Sivadevi memutuskan bahawa: (a) tindakan untuk menguatkuasa caj tanah terangkum di bawah s 21(1) dan bukan s 21(2) Akta; (b) tindakan sedemikan menjadi dihalang masa selepas tamat 12 tahun dari tarikh apabila hak untuk menerima wang dijamin oleh caj yang terakru; (c) 12 tahun tersebut mula berjalan selepas tamat satu bulan selapas pelanggaran atau tempoh alternatif sedemikian seperti yang mungkin dinyatakan di dalam caj (perkataan-perkataan di dalam s 254(1) KTN); dan (d) ia adalah salah untuk memutuskan bahawa 12 tahun hanya mula berjalan apabila penggadai gagal untuk meremedi pertikaian atau pelanggaran seperti yang dinyatakan di dalam notis Borang 16D kerana ini bukan sahaja

menyebabkan perkataan-perkataan di atas di dalam s 254(1) KTN tidak bermakna tetapi menyebabkan masa tidak berjalan sehingga pemegang cagaran telah mengeluarkan notis Borang 16D tersebut. Dalam keadaan demikian, pemegang cagaran boleh memutuskan untuk tidak berbuat apa-apa untuk beberapa tahun dan masih berada dalam masa apabila ia memutuskan untuk menguatkuasakan haknya untuk perintah jualan.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Atas kekuatan *Sivadevi* dan untuk alasan-alasan yang dinyatakan di dalam kes tersebut, rayuan ini mesti dibenarkan. Fakta dalam rayuan ini memperkukuhkan pandangan yang diputuskan di dalam kes *Sivadevi*. Dalam kes ini, pendulu dalam hakmilik MBB bukan hanya tidak mengambil kira pelanggaran dan pengingkaran yang membangkitkan kepada hak untuk menjalankan remedi statutori perintah jualan terhadap hartanah yang dicaj tersebut; ia juga menjalankan dan bertindak atas hak tersebut. Hak tersebut tidak boleh wujud dalam vakum, terasing daripada perjanjian kontraktual yang menjadi dasar yang dicapai di antara pihak-pihak. KTN juga menerima perjanjian nyata tersebut dalam ss 249 dan 253. Dengan menerima pelanggaran dan pengingkaran yang membangkitkan kepada kausa tindakan untuk menguatkuasakan caj tersebut melalui perintah jualan, MBB sekarang ini diestop daripada mencadangkan sebaliknya (lihat perenggan 19 & 24).

(2) Perintah jualan di dalam rayuan ini adalah jelas dihalang masa di bawah s 21 Akta Had Masa 1953. Perayu-perayu telah menunjukkan dengan sangat banyak 'cause to the contrary' dalam prinsip *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (lihat perenggan 25).]

Notes

For a case on application for order for sale of charged land, see 9 *Mallal's Digest* (5th Ed, 2015) para 2347.

Cases referred to

CIMB Investment Band Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd [2014] 6 MLJ 779, FC (refd)

Kandiah Peter v Public Bank Berhad [1994] 1 MLJ 119, SC (refd)

Mui Bank Bhd v Cheam Kim Yu (Beh Sai Mina, Intervener) [1992] 2 MLJ 642, SC (refd)

Ramley bin Ismail v CIMB Bank Bhd [2017] MLJU 67, CA (refd)

S & M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd [2015] 5 MLJ 717, FC (refd)

Sivadevi a/p Sivalingam v CIMB Bank Bhd [2018] 5 MLJ 82, CA (folld)

Tan Kong Min v Malaysian National Insurance Sdn Bhd [2006] 1 MLJ 601; [2005] 3 CLJ 825, FC (refd)

Legislation referred to

National Land Code ss 48, 249, 253, 256, 206(3), 260, 263, 418, Part 16, Form 16D
Limitation Act 1953 ss 6, 6(3), 21, 21(1), (2)
Rules of Court 2012 O83

Appeal from: Originating Summons No 24–46–06 of 2015 (High Court, Kuala Lumpur)

Amarjeet Singh (Zubeda & Amarjeet) for the appellants.
Lua Kok Hiyong (Lua & Mansor) for the respondent.

Mary Lim JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal against the decision of the land administrator who, on 24 May 2015, pursuant to s 418 of the National Land Code had granted in favour of the chargee respondent, an order for sale of land located at Lot 42190 Mukim Batu, Negeri Wilayah Persekutuan ('subject land'). By originating summons, the appellants sought to set aside that order for sale on the primary basis that there is cause to the contrary; that the order sought is barred by the Limitation Act 1953.

[2] The originating summons was dismissed and the issue on appeal concerns the matter of whether s 21(2) of the Limitation Act 1953 applies.

[3] At the time of hearing of this appeal, the case in *Sivadevi a/p Sivalingam v CIMB Bank Bhd* [2018] 5 MLJ 82 was also under consideration. As the two cases concerned the same issue, the parties were asked to address us on the same concerns that arose in that appeal; namely whether s 256 and the related provisions to s 256 of the National Land Code is substantive or procedural law; the relevance and application of the various provisions of s 21 of the Limitation Act 1953; and whether res judicata applies.

[4] Having heard the respective counsel and having had the benefit of further submissions of both learned counsel, this is our decision.

BRIEF FACTS

[5] The Pacific Bank Bhd had granted various loan and overdraft facilities to the appellants. Two charges were created and registered over the subject land

in favour of The Pacific Bank Bhd in respect of those facilities. When the appellants defaulted in their repayment obligations, The Pacific Bank Bhd issued a notice of demand on 15 April 1998 and 20 May 1998. Subsequently, The Pacific Bank Bhd terminated the facilities and sued the appellants by way of a civil suit filed on 8 June 1998. A summary judgment was entered on 14 August 1999.

[6] At the same time, The Pacific Bank Bhd initiated 'foreclosure action', issuing a separate letter of demand on 21 June 1998 followed by a Form 16D notice under s 256 of the National Land Code on 27 September 1998. As the subject land was held under a land office title, this first 'foreclosure action' was made to the Land Administrator of Wilayah Persekutuan.

[7] On 10 March 1999, the land administrator held an inquiry under s 263 of the National Land Code and on 6 May 1999, granted an order for sale. This order was set aside by the High Court on 9 December 1999 with liberty to the respondent to apply for a fresh order for sale of the subject land. The respondent's appeal was dismissed by the Court of Appeal on 29 June 2004. No further action was thereafter taken by The Pacific Bank Bhd.

[8] Subsequently, the assets of the Pacific Bank Bhd were vested with the present respondent. On 22 February 2010, the respondent caused a fresh notice of demand to be issued followed by a fresh Form 16D notice. Both were served at the appellants' last known addresses. There were no remedial action by the appellants and on 27 May 2014, the respondent sought an order for sale under s 260 of the National Land Code. The appellants attended the enquiry and despite raising objections, the order for sale was granted by the land administrator.

[9] The appellants appealed to the High Court under s 263 of the National Land Code. The principal issue is that of limitation under ss 6 and 21 of the Limitation Act 1953.

[10] In so far as the argument under s 6(3) of the Limitation Act 1953 is concerned, the appellants maintained that the respondent was bound by what is referred to as 'the final order of 9 December 1999'; that is, the order of the High Court setting aside the first order of sale. The appellants argued that the second application for order for sale must be made within 12 years commencing from the date of that final order. The date expired on 8 December 2011. Consequently, the second application for sale filed on 9 June 2012 is said to contravene s 6(3) of the Limitation Act 1953.

[11] The second argument on limitation pertains to the respondent's right to pursue a charge action, that such action is prohibited under s 21(2) of the

Limitation Act 1953. The appellants maintain that the fresh Form 16D notice is invalid as it is issued more than 12 years after the date of breach or default under the charges. According to the appellants, the default or breach was in April or May 1998 with the notice of demand issued by the respondent on 21 June 1998 followed by the statutory notice in Form 16D on 27 September 1998. The respondent's right to foreclose flowed from those dates. When the respondent filed the second charge action to foreclose in 2014, limitation had set in by 2010. Thereafter, the law extinguishes such rights of action. The Federal Court decision in *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601; [2005] 3 CLJ 825 was cited in support.

[12] The respondent countered with their arguments that the respondent was entitled to issue a fresh Form 16D notice and that the time period of 12 years runs only one month from the date of default to remedy as required under the notice. Since the notice was issued on 12 March 2012, the application for an order for sale filed on 23 June 2015 was within the 12 year period prescribed under s 21(2) of the Limitation Act 1953.

DECISION OF THE HIGH COURT

[13] The learned judge agreed with the respondent and dismissed the appellants' contentions. The learned judge found that the respondent's right to exercise its statutory remedy did not arise until the appellants' failed to remedy the default specified in the statutory Form 16D notice issued on 12 March 2012. Consequently, the application for an order for sale filed on 23 June 2015 was said to be within the 12 year period prescribed in s 21(2) of the Limitation Act 1953.

DECISION OF THE COURT OF APPEAL

[14] There were several grounds raised to resist the order for sale. These were all abandoned in favour of the issue on limitation. Even then, the argument is confined to the second aspect of limitation, whether s 21 of the Limitation Act 1953 applies. With that narrow focus, we shall only address that issue taking into account our opening remarks.

[15] In the recent decision of the Court of Appeal in *Sivadevi a/p Sivalingam v CIMB Bank Bhd* [2018] 5 MLJ 82, this court has expressed its views on the interpretation and construction of s 21, in particular ss 21(1) and (2) of the Limitation Act 1953, Part 16 of the National Land Code and O 83 of the Rules of Court 2012. Although that decision concerned an order for sale initiated in respect of a registry title under s 256 of the National Land Code, the views and conclusions there apply with equal force to the present charges registered against land office titles. We adopt those views and conclusions for the purpose

of this appeal and we agree with the views of the Court of Appeal expressed therein.

[16] Before we set out the relevant parts of that decision, we further agree with learned counsel for the appellant that the enforceable agreement between the parties are unaffected by the creation of the legal charge or by the enforcement of the remedy of sale in the event of any breach of the express or implied terms in the loan agreement as well as in the charge. In *S & M Jewellery Trading Sdn Bhd & Ors v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717, the Federal Court observed that:

> ... the provisions of the Code requiring a dealing to be effected in the statutorily prescribed manner shall not ... affect the contractual operation of any transaction relating to alienated land or any interest therein.

[17] Although the observations of the Federal Court were made in the context of s 206(3) of the National Land Code, we believe the observations are relevant and apply equally in relation to s 256 and Part 16 of the National Land Code. More so, when we examine s 253. This was discussed in the case of *Sivadevi a/p Sivalingam v CIMB Bank Bhd* and we now set out the relevant parts of that judgment (paras 9–67 and 72–80):

> [9] An order for sale will not be ordered where the chargor is able to show cause to the contrary under s 256(3) of the National Land Code. In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, the Federal Court explained how applications under s 256 of the National Land Code are to be treated:
>
> > A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.
> >
> > In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse and order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.
> >
> > On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.

A Although each case turns upon its own facts ...

We have said that s 256(3) must be read narrowly. It does not, however, follow from this that the chargor who is unable to satisfy the court of cause to the contrary is left without any remedy whatsoever, allegations that fail to amount to cause to the contrary may, as observed earlier, nevertheless form the basis of an B action in personam against the chargee.

[10] From the affidavits filed and the submissions made, the appellant argues that he has successfully shown cause to the contrary when he is able to show that the proceedings taken under O 83 of the Rules of Court 2012 are barred under s 21 of C the Limitation Act 1953. Since the default which gave rise to the right to 'foreclose' was the default in the repayment of the loan agreement, the computation of the 12 year limitation allowed under s 21 of the Limitation Act 1953 must necessarily commence from the date of the last payment. That date is 12 May 2003 in which case, limitation set in 12 years from that date, which is on 12 May 2015. The 'foreclosure proceedings' initiated on 8 August 2016 is consequently, barred. D

[11] The respondent disputes this interpretation arguing that the 12 year limitation under s 21 of the Limitation Act 1953 runs from the date the Form 16D notice which is issued under s 256 of the National Land Code is served on the appellant. Since the appellant was served on 29 January 2016, the 12 year period is computed from this date in which case the proceedings are not time-barred. Alternatively, the E respondent argued that there was fresh admission or acknowledgment of the debt *vide* a letter written by Thamil Selven a/l Savarimuthu on 13 July 2010. Time would then run from 13 July 2010.

[12] In support of their submissions, the respondent relied on the decisions of the Court of Appeal in *Peh Lai Huat v MBF Finance Bhd* [2011] 3 MLJ 470 and *Jigarlal* F *K Doshi @ Jigarlal a/l Kantilal v Resolution Alliance Sdn Bhd & Another* [2013] 3 MLJ 61.

[13] In *Peh Lai Huat*, the Court of Appeal was invited to consider whether the respondent's application for an order for sale was barred by limitation. The respondent's predecessor in title had lent the appellant a sum of RM300,000. The G loan was secured by a charge over the appellant's land. The appellant defaulted in his repayments with the last payment made on 28 January 1986. On 17 August 2000, the respondent issued a Form 16D notice demanding payment on the loan together with interest. There was no payment. The respondent applied for a sale of the land. It was opposed by the appellant on the ground that the proceedings were time H barred. The High Court ruled against the appellant. That decision was upheld on appeal.

[14] The Court of Appeal found that the appellant had overlooked the fact that the proceedings before the High Court was not a claim to recover a debt due. The true nature of the claim was as described by Seah SCJ in *Malaysian International* I *Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 CLJ 236 as an 'exercise of their statutory remedy ... under the National Land Code'. Consequently, the Court of Appeal concluded that ss 21(1) and (2) had no application in the case. In the view of the Court of Appeal, 'the cause of action, which is the right to exercise the statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the Form 16 notice'.

[15] In *Jigarlal,* the appellant had defaulted in the repayment of loans provided by the respondent bank. The bank's letters of demand for payment of outstanding sums proved unsuccessful. The bank then issued two Form 16D notices under s 256 of the National Land Code. The appellant failed to remedy the breaches and the bank commenced proceedings in court for an order for sale. One of the arguments raised was the 15 year delay calculated from the act of default.

[16] On this issue, the Court of Appeal in *Jigarlal* following the decision in *Peh Lai Huat,* disagreed with the appellant and found that the cause of action by a chargor does not accrue from the date of default of repayment of the loan but from when the chargor fails to remedy the default specified in the Form 16D notice. The Court of Appeal further held that the cause of action accrued upon the expiry of the 30 day notice specified in the Form 16D notice; and that the applicable period of limitation was 12 years under s 21(1) of the Limitation Act 1953. We were urged to follow these two earlier decisions.

[17] Having examined very carefully and anxiously the various legislation at play and the numerous case authorities, with the greatest respect, we were compelled to decline.

[18] From the extensive oral and written submissions made, it may be safely concluded that both parties agree that s 21 of the Limitation Act 1953 applies. The question now is the commencement date of that 12 year period; is it from the date of default in repayment or is it from the date of service of the Form 16D notice. It is our view that when s 21 is carefully examined, and examined together with s 256 of the National Land Code and O 83 of the Rules of Court 2012, it will become readily apparent that the 12 year period commences from the date when the right to receive the money accrued. Where and when such a right accrues, action or proceeding is then brought to enforce the charge in question. The enforcement of the charge is necessarily by an order of sale. In the case of a registry title, the order is made by the High Court under s 256 of the National Land Code, whereas in the case of a land office title, the order for sale is made by the land administrator under s 260. In the latter, the sale may be ordered by the High Court under s 265(3).

[19] Section 21 of the Limitation Act 1953 reads as follows:

Time bar pursuant to section 21(2) Limitation Act

21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of sale of land

(1) *No action shall be brought* to recover any principal sum of money secured by a mortgage or other charge of land or personal property or *to enforce such mortgage or charge,* or to recover proceeds of the sale of land or personal property *after the expiration of twelve years from the date when the right to receive the money accrued.*

(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:

Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to

have accrued until the date on which his possession discontinued.

(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interests or any life insurance policy which has not matured or been determined.

(4) Nothing in the preceding subsections of this section shall apply to a foreclosure action in respect of mortgaged land but the provisions of this Act relating to actions to recover land shall apply to such an action.

(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years form the date on which the interest became due:

Provided that —

(a) where a prior mortgagee or other incumbrancer has been in possession of the property mortgaged or charged, and an action is brought within one year of the discontinuance of such possession by the subsequent incumbrancer, he may recover by that action all the arrears of interest which fell due during the period of possession by the prior incumbrancer or damages in respect thereof, notwithstanding that the period exceeded six years;

(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

(6) This section shall not apply to any mortgage or charge of a ship. (Emphasis added.)

[20] There are several observations that we must make of s 21. First, it uses distinct and particular terms, some of which are defined in the Act itself. Where the terms are defined by the Act itself, those definitions apply to and guide in the interpretation and application of the particular provision under discussion. The terms which are defined in s 2 of the Limitation Act 1953 and relevant for the purpose of s 21 are the following terms:

'action' includes a suit or any other proceeding in a Court of law;

'personal estate and personal property' do not include land or chattels real; *'land'* includes things attached to the earth or permanently fastened to anything attached to the earth, rent charges and any legal or equitable estate or interest in land including an interest in the proceeds of sale of land held upon trust for sale but save as aforesaid does not include any right of way, easement, servitude,

> profits over or in respect of land, or right in the nature of an easement, servitude or profit over or in respect of land, or any other corporeal hereditament.

[21] The terms 'mortgage' (including mortgagee and mortgaged) and 'charge' are however, not defined under the Limitation Act. We appreciate that in *Peh Lai Huat v MBF Finance Bhd*, the Court of Appeal noted that 's 21 speaks of a 'mortgage', which is a type of security that the Code does not recognise. However, in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266*, the former Federal Court speaking through Salleh Abas CJ (Malaya) held that: 'when* s 21(1) of our Limitation Act *speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code.' It is precisely for that reason that* s 21 *is the relevant and applicable law'.*

[22] Learned counsel for the respondent has urged this court to take the position that the land jurisprudence in this country does recognise mortgages but not in the English sense as understood under the English land jurisprudence. In Malaysia, mortgages are charges because that is the only charge recognised — see *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135.

[23] We have examined the Federal Court decision in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 and have found that the remarks and findings of the Federal Court must be understood as being applicable to its peculiar facts. While the National Land Code may not recognise a mortgage as a security in that there are no provisions dealing with mortgage, it cannot be ignored that not only are the two terms distinct and different, the use of the two terms in the same provision of s 21 is deliberate by Parliament. At the time the Limitation Act was enacted in 1953, the National Land Code had yet to come into existence; the applicable land law were the respective Land Codes of the Federated Malay States and of the Straits Settlements.

[24] In fact, in an early decision of *John Edgar Jones v PLSKR Palaniappa Chetty* [1935] MLJ 175, Thomas CJ had recognised the difference between a charge from a mortgage:

> Now, a charge under the Land Code bears certain superficial resemblances to a mortgage in England in that it contains a promise to pay and makes the land a security for the debt, but there are essential differences. Whereas in England the estate is transferred to the mortgagee leaving the mortgagor a bare equity of redemption, under the Land Code the estate remains in the chargor who is regarded as the proprietor.

[25] The difference between the two is succinctly explained in *Enforcement of Charges Handbook* (Malayan Law Journal Sdn Bhd 1999); that no title or ownership passes in the case of a charge whereas in the English law concept of mortgage, the estate is conveyed by the mortgagor to the mortgagee; the mortgagor retains the right of redemption. It is only upon the mortgagor's failure to redeem that the mortgagee can foreclose. In *Janab's Key to Practical Conveyancing & Islamic Banking* by Datuk Dr Hj Hamid Sultan bin Abu Backer, the writer, relying on *Mahadevan s/o Mahalingam v Manilal & Sons (M) Sdn Bhd*, suggests that the National Land Code 'certainly recognises a mortgage in the sense of Torrens system, referred to by text writers as Torrens mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security'.

[26] Peh Swee Chin J in *Bank Bumiputera Malaysia Bhd v Doric Development Sdn Bhd & 2 Ors* [1988] 1 MLJ 462 has also described charges as being governed under statute whereas 'an English mortgage at common law was a horse of a different colour altogether'. Even Salleh Abas FJ himself expressed in an earlier decision of *Eng Ah Mooi & Ors v Overseas Chinese Banking Corp* [1983] 1 MLJ 209 that there are differences between a mortgage and a charge but:

> In essence both the common law mortgage and the charge under the National Land Code are legal encumbrances on the proprietary right of an owner.

[27] In other words, there is a real distinction between a mortgage and a charge, certainly for the purposes of consideration under the Limitation Act 1953. In the case of a charge, only the interest is transferred to the chargee; the ownership remains with the chargor. In the case of a mortgage, both the interest and ownership are with the mortgagee and the mortgagor only has a right to redeem the land back upon full payment. In the case of a charge, under s 243 of the National Land Code, the charge merely renders the land in question liable as security. When there is a default, there is no automatic power of sale or foreclosure; legal proceedings under both the National Land Code and the Rules of Court 2012 have to be initiated to sell the charged property. The provisions of the National Land Code are designed to allow a chargee, 'who is not the registered proprietor (unlike the mortgagee) of the subject property, to sell the land of the chargor and be the conduit for the passing of good title to the purchaser who buys under the sale ordered under section 256' — see *Judith Sihombing in National Land Code — A Commentary* (2nd Ed) at p 564.

[28] From the above elucidation on the differences between a mortgage and a charge, an action to exercise the statutory remedy for an order for sale or a judicial sale is actually not an action to foreclose. But, for too long a time now, it has been frequently referred to as an action to foreclose under O 83 of the Rules of Court 2012. Regardless, such an action for an order of judicial sale falls within the terms of s 21(1). In *Hussain v Chanda Singh* [1935] 1 MLJ 262, a case though concerning chattels (cattle) is nevertheless of some application, the meaning of the term 'foreclosure' was discussed. The court explained that the term is 'certainly in common use, ... also in relation to the procedure for obtaining an order of sale of charged lands under the Land Code; the word has been used loosely. You have to obtain an order for sale of charged lands; ...'. After acknowledging the difference between strict foreclosure in the case of mortgaged estate and statutory foreclosure, Cussen J went on to explain that the word 'appears to me simply to mean the exercise of the right whatever form it takes the right to seizure and possession'. In the strict foreclosure action, proceedings are initiated in court by a bill of foreclosure, the result of which is the forfeiture or extinguishment of the mortgagor's right to redeem and the vesting of the estate in the mortgagee in perpetuity.

[29] Having made the above observations, nothing really turns on this distinction as we are not presented with a mortgage in the present appeal; the security is a charge. The above observations are necessarily made so as to draw attention to the careful deployment of particular terms, concepts and arrangements that exist in the market and also in the particular legislation under consideration; that these different terms are used not without reason. When reading the particular legislation, care must be exercised as to the specific term or legal encumbrance under scrutiny; that under the Limitation Act of 1953, there is a distinction between the two interests.

[30] Returning to the terms of s 21, we make the second material observation with particular focus on s 21(1). Breaking down its various components reveals that the provision envisages three contexts or types of actions in its application. The three types of actions are:

(i) any action to recover any principal sum of money which is secured by a mortgage or other charge of land or personal property;

(ii) any action to enforce such a charge of land or personal property;

(iii) any action to recover proceeds of sale of land or personal property.

[31] In any of those three contexts, the action must be brought within 12 years from the date when the right to receive the money accrued. The computation of the 12 year period is necessarily by reference to the date when the right to receive the money accrued since no other date is offered under the terms of s 21(1).

[32] Further, s 21 (1) applies to both land and personal property, using the two terms distinctly just as in the case of mortgage and charge since by the definition in s 2, 'personal property' does not include 'land' while land includes chattels real and immovable property. By that same definition, a charge would fall within the meaning of the term 'land' as a charge creates a legal and equitable interest in the land.

[33] Therefore, by definition and by the express conditions and circumstances specified in s 21(1), an action in relation to a charge of land will not and cannot fall within the terms of s 21(2), as it applies to *'mortgaged personal property*' that necessarily excludes land; or even under s 21(4) as the interest here is a charge and not a mortgage. With this, we regret we are unable to follow the decisions in *Peh Lai Huat v MBF Finance Bhd* and *Jigarlal K Doshi @ Jigarlal a/l Kantilal v Resolution Alliance Sdn Bhd & Another*.

[34] The Court of Appeal in *Peh Lai Huat v MBF Finance Bhd* was of the view that both ss 21(1) and (2) have no application because the cause of action was the right to exercise the statutory remedy of an order for sale did not arise until the appellant had failed to remedy the default specified in the Form 16D notice issued under s 256 of the Code.

[35] With respect, we differ from that conclusion and with decision in *Jigarlal* for the following reasons.

[36] As explained earlier, the specific use of particular terms in s 21 itself and as defined in s 2 of the same Act does not lend itself to a reading that charges and mortgages, and land and personal property, are one and the same for the purpose of the limitation laws.

[37] Although the Court of Appeal in *Peh Lai Huat* had expressed the view that both ss 21(1) and (2) did not apply because of the nature or cause of action, that it was not an action to recover a principal sum of money secured by a charge on land, or a foreclosure of mortgaged personal property; that it was an action to exercise a statutory remedy for an order for sale, the Court of Appeal nevertheless proceeded to find that 'the originating summons was here filed on 6 April 2001, well within the 12 year period prescribed by s 21(2) of the Limitation Act'.

[38] In our view, this indicates that the Court of Appeal recognised that a cause of action, in the absence of any express provision to the contrary whether under the National Land Code or any other legislation, would always be subject to the law on limitations. This reading is consistent with the intention of the Limitation Act as can be seen from its long title; that it is 'an *Act to provide for the limitation of action and arbitration*'. There are, in any case, no provisions in the National Land Code to exempt the application of the Limitation Act.

[39] The action to exercise the statutory remedy of an order for sale clearly falls within the meaning of the term 'action' as used in s 21. Further, s 2 of the Limitation Act defines the term to include all suits or any other proceeding in a court of law. An action for an order for sale of land may only be made pursuant to O 83 of the Rules of Court 2012 which is specific procedural rules for charge actions.

[40] Under O 83 of the Rules of Court 2012, an action for the order for sale of land is frequently and loosely referred to as an action for the specific relief of 'foreclosure' though as we have shown earlier, it is not appropriate to use the term 'foreclosure' in relation to charge actions or actions for an order for sale. Regardless, an action or proceedings seeking an order for sale is undeniably proceedings in a court of law.

[41] The terms of O 83 of the Rules of Court 2012 confirms this reading:

ORDER 83

CHARGE ACTIONS

Application and interpretation (O 83 r 1)

(1) This order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs:

(a) payment of moneys secured by the charge;

(b) sale of the charged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security;

(g) delivery of possession by the chargee.

(2) In this order, 'charge' includes a legal and an equitable charge.

(3) An action to which this order applies is referred to in this order as a charge action.

(4) These rules apply to charge actions subject to the following provisions of this order.

[42] We must emphasise that the above reading and construction does not derogate from the fact that the charge action, the action to exercise a statutory remedy of sale of charged property or to enforce a charge in order to receive the money now accrued to the chargee, remains very much an action *in rem* with the chargee retaining the other right to sue *in personam.*

[43] Where a borrower defaults in repayments, the Federal Court in *Chan Boi Loi v Public Bank Bhd & Another Application* [2009] 6 CLJ 81 reiterated that 'a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successfully to recover the money unless there is an agreement to the contrary'. In the event there is a shortfall after a public sale, the right to bring an action *in personam* to recover the balance outstanding is not postponed until the charged land is sold. The right of realization of the property does not vest in the lender a new, separate and independent cause of action. The promise to pay or the right to recover for a shortfall does not affect the original promise or obligation to pay; the obligation to pay remains, just that it is now for, a lesser sum.

[44] As expressed by Lord Hershell LC in *Re McHenry McDermott v Boyd* [1894] 8 Ch 290, 'The truth is that the debt is one debt only. The second clause of the document did not create a new debt, but only prescribed what should be done in the event of realisation, and what use should be made of the money realised. The words gave the creditor no right which would not equally have existed without them'. After all, an order for sale is not a judgment as was settled in the case of *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257:

> Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code. The appellant's claim was not under a covenant but under the registered charge.

[45] This view was affirmed by the Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under a registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The Court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are called from several decisions of our courts which have correctly stated the law upon the subject.

See also Federal Court decisions in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 and *CIMB Investment Bank Bhd v Metroplex Holdings Sdn Bhd* [2014] 9 CLJ 1012.

[46] Where the action is to recover proceeds of sale of land or personal property, the Federal Court's deliberations in the case of *Tan Kong Min v Malaysian National*

Insurance Sdn Bhd [2006] 1 MLJ 601; [2005] 3 CLJ 825 are relevant. There, the Federal Court had occasion to deal with the interpretation and application of s 21 of the Limitation Act 1953. In that case, the appellant was granted a housing loan by the respondent. By way of security, a first legal charge was created over the appellant's land in favour of the respondent. The appellant defaulted in his repayments and the respondent exercised their statutory rights and 'foreclosed' on the land by way of a public auction. There was a shortfall from the auction and so, pursuant to cl 7 of the Annexure to the charge, the respondent demanded payment of the difference between the amount due and the amount realised from the sale together with interest. There was a failure to pay and the respondent sued. The claim was dismissed at first instance but allowed on appeal.

[47] At the Federal Court, the principal question was whether the claim for the balance after the sale was a claim for money secured by a charge on land and therefore subject to the limitation period of 12 years under s 21(1) of the Limitation Act; or, was it still a claim founded on contract and thereby subject to the limitation of six years under s 6(1)(a) of the Act.

[48] The Federal Court held that by virtue of s 6(5), s 6 does not apply as the action was to recover money secured by, inter alia, a charge on land. The Federal Court concluded that the action was to recover money secured by a charge. Such an action is an action in personam to which s 21(1) applies whereas s 21(2) specifically refers to a foreclosure action in respect of mortgaged personal property which is an action in rem. In both cases, the limitation period is 12 years, from the date when the right to receive the money accrued or the right to foreclose accrued, as the case may be.

[49] Where the action is to recover the balance money, the ensuing question is when does the cause of action with regard the personal liability of the chargor arise or deemed to have accrued. In answering this poser, the Federal Court reviewed the relevant authorities of *Lim Kean v Choo Koon* [1970] 1 MLJ 158 and *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 2 CLJ 871 before concluding that:

> In the circumstances of the present appeal before us, we are of the view that the point in time where all the material facts are said to be in existence to render the cause of action complete would be after the sale has been conducted and the differential amount remaining due to the respondent has been ascertained.

[50] The Federal Court found that on the facts, the earliest possible date that the respondent could sue the appellant for breach of his personal covenant would be the date the property was sold by auction. For purposes of considering when the period of limitation commences, the Federal Court held that it was when the appellant failed to settle the difference when required to do so by the respondent's letter of demand. The limitation period runs from the expiry of the time specified for payment. The Federal Court rejected the argument that time ran from the time the appellant first defaulted. According to the Federal Court:

> ... this would mean that the respondent should have proceeded by way of a civil suit (when the appellant defaulted in repayment of his housing loan) concurrently with realising the security under the charge in order to avoid the danger of being caught by limitation, instead of realising the security under the charge first and upon the sale being concluded, to institute a separate action to

recover the insufficient amount from the chargor personally as being done here ...

[51] Having explained our above concerns, we return now to s 21 of the Limitation Act and to the three types of action which are envisaged under s 21(1). The facts in the present appeal do not concern a recovery of the principal sum of money which is secured by a charge or even an action to recover proceeds of sale of land or even the balance sum after a sale. It is an action to enforce a charge of land with the single purpose of receiving money which has accrued. Such an action falls, quite clearly, within the terms of s 21(1).

[52] What then is the relevance or implication of s 21 of the Limitation Act on and its co-relation with O 83 of the Rules of Court 2012 and s 256 of the National Land Code?

[53] In order to enforce a charge, two steps are mandatory: compliance with the requirements of s 256 of the National Land Code; and compliance with the requirements of O 83 of the Rules of Court 2012. In this regard, the authorities have been consistently clear that compliance of the various requirements is strict, that an order for sale will not be allowed where there is non-compliance of in particular rr 3(6) and 3(3) of O 83 of the Rules of Court 2012 concerning the amount of the repayments and the amount of instalments in arrears, that these matters must be clearly stated. See: *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283; and *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608, the latter approved by the Supreme Court in *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422; both cases discussed by the Court of Appeal in *Lum Choon Realty v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409 at p 431.

[54] However, it cannot be denied that without attending to the notice requirements specified under s 256 of the National Land Code, there cannot be any proceedings or action under O 83. We are of the view that like O 83 of the Rules of Court 2012, Chapter 3 of the National Land Code and in particular, s 256, deal with the procedural details that must be attended to before the separate right to enforce an in rem action to realise or foreclose on the charge can be validly affected.

[55] Part 16 of the National Land Code regulates charges and liens. It has five Chapters: Chapter 1 deals with the creation of charges and liens, Chapter 2 contains the implied provisions; Chapters 3 and 4 deal with the respective remedies of sale and possession while Chapter 5 deals with the matter of discharge or redemption. Section 249 statutorily implies certain agreements into all charges:

249 Agreements by chargor implied in all charges

(1) In every charge created under this Act, there shall be implied on the part of the chargor:

(a) an agreement that he will comply with the provisions thereof as to payment of the sum or sums thereby secured, and with any provision for the payment of interest thereon, if any; and

(b) an additional agreement in the terms set out in subsection (2) or (3), according as the subject- matter of the charge is land or a lease.

(2) The additional agreement by the chargor in the case of a charge of land shall be an agreement that he will during the continuance of the charge:

(a) pay all rent falling due to the state authority in respect of the land, and all rates, taxes and other outgoings relating thereto, and

(b) duly observe and perform all conditions, express or implied, to which the land is subject.

(3) The additional agreement by the chargor in the case of a charge of any lease shall be an agreement that he will during the continuance of the charge pay the rent reserved by the lease, and duly observe and perform all other provisions thereof, express or implied.

[56] Sections 250 and 251 further imply, in the absence of express provisions to the contrary, certain provisions into all charges.

[57] Where there is a breach of either the express or the implied agreements of the charge, Chapters 3 and 4 provide for the remedies of sale and possession. Chapter 3 is of concern and it is set out as follows:

Chapter 3

Remedies of Charges: Sale Introductory

253 Purpose and scope of this Chapter.

(1) The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which this charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

(2) The powers conferred by this Chapter shall be additional to those conferred by Chapter 4, and no chargee shall be debarred from exercising them by reason of the facts that he has already taken action under that Chapter.

(3) In this Chapter —

'bidder' means only one natural person, one corporation or one single body and does not include the chargor;

'chargee' includes a financial institution;

'financial institution' means any licensed bank, licensed finance company or licensed merchant bank as defined in the Banking and Financial Institutions Act 1989, any co-operative society carrying on the business of financing and any statutory body established under any Federal or State law acting as chargee under this Act; and

'purchaser' means the successful bidder.

(4) For the purposes of this Chapter, the chargor or chargee may appoint any person or body to perform his duties or take action on his behalf and notice of any such appointment shall be given in writing to the Registrar of the Court or the Land Administrator, as the case may be.

Notice Before Sale

254 Service of default notice, and effect thereof.

(1) Where, in the case of any charge, any such breach of agreements as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D —

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedted —

(a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter:

Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

255 Special provision with respect to sums payable on demand.

(1) Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under subsection (1) of section 254.

(2) The provisions of sub-section (2) of section 254 shall apply to notices in Form 16E as they apply to notices in Form 16D.

Procedure — Registry Title, Qualified Title Corresponding Thereto, And Subsidiary Title

256 Application to Court for order for sale.

(1) This section applies to land held under:

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

A and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provision in that behalf of any law for the time being in force relating to civil procedure.

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(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

C [58] It is evident from s 254, reinforced by s 253, that in the event the chargor breaches any of the express or implied agreements, the chargee has the right to obtain an order for the sale of the charged land. That order of sale is granted by the High Court under ss 256(2) and (3) read together with O 83 of the Rules of Court 2012, O 83 being the law relating to civil procedure for the time being in force. Before the application may be properly undertaken, a notice in Form 16D must be D issued pursuant to s 254. The notice is intended to first indirectly remind the chargor of his obligations by pointing out the specific breach; telling the chargor to remedy the breach within the time period specified in the notice; before finally warning the chargor that if the notice is not complied with, proceedings to obtain an order for sale will be sought. Where the chargor does not heed the requirements in the notice, the chargee is then entitled to apply to court for the order for sale E under s 256.

[59] The above sets out the mechanism or the process that must be followed before the chargor may apply to the court for an order for sale of the charged property. But, insofar as how long has the chargor got before the chargor may get round to enforcing that right to seek an order for sale is concerned, the provisions of the F Limitation Act 1953 will have to be considered. According to the decisions in *Peh Lai Huat v MBF Finance Bhd* and *Jigarlal K Doshi @ Jigarlal a/l Kantilal v Resolution Alliance Sdn Bhd & another*, s 21(2) operates only from when the chargor fails to remedy the default or breach as specified in the Form 16D notice.

[60] With respect, aside from the reasons already pointed out, including the fact G that s 21(2) applies to 'mortgaged personal property' which necessarily excludes land, which is the case here; that the proper and applicable provision is s 21(1), the right to enforce a charge must be taken within 12 years calculated not from when the right to seek an order for sale accrued, but from when the right to receive the money accrued, as are the clear terms of s 21(1). The question that now emerges is H when does the right to receive the money accrued arise? That question is both a necessary and appropriate question to pose in the light of the law of limitations on the right of action. The Federal Court decision in *Nasri v Mesah* [1971] 1 MLJ 32 is that a right to sue would depend on when the cause of action arose. This view was followed in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 1 CLJ 207.

I [61] In *Nasri v Mesah,* the Federal Court was clear that 'a cause of action arises when at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought'. The Federal Court was of the further view that the 'expressions 'the right to sue accrues', 'the cause of action accrues': and 'the right of action accrues' mean one and the same

thing when one speaks of the time from which the period of limitation as prescribed by law should run'.

[62] It is a statutorily implied term prescribed under s 249(1)(a) of the National Land Code that the chargor has agreed that 'he will comply with the provisions thereof as to payment of the sum or sums thereby secured, and with any provision for the payment of interest thereon, if any'. Where the chargor breaches that agreement to pay the sum secured by the charge, the chargee correspondingly is deprived of its right to receive the money accrued. It is at this point that the right to enforce the charge arises and the right to sue or the cause of action accrues.

[63] However, before the chargee may proceed to enforce its right in relation to the charge, the chargee is required to comply with the provisions under the National Land Code. Here, the additional safeguards provided under Part 16 requires the breach of the express or implied agreement must have 'continued for a period of at least one month or such alternative period as may be specified in the charge' before the efforts towards enforcing that charge can take place. The object of this notice was expressed by the Federal Court in *Jacob v Overseas Banking Corporation, Ipoh* [1974] 2 MLJ 161:

> ... was to see that sufficient notice was given to the chargor before the chargee applied for an order of sale and in this case the chargee had given the chargor sufficient notice before coming to the court.

[64] The provision granting the right to sell charged land is in s 254 of the National Land Code, facilitated by the procedural rules in O 83 of the Rules of Court 2012. The 12 year period commences a month after the breach or after the chargor has been deprived of the right to receive the money accruing under the charge. This period does not alter the underlying contractual relationship between the parties. The in rem right over the subject land is conferred by reason of the contractual agreement between the parties and that right is fortified in law in that it is recognised as a valid registrable encumbrance over the subject land. Without the underlying contractual relationship, and absent of any breach, the chargee not only cannot but has no right to approach the court under the terms of the National Land Code and O 83 of the Rules of Court 2012 for an exercise of the statutory right of sale. The right to pursue this statutory remedy is triggered by an event of breach or default in the underlying contractual agreement and in the terms of the charge — see Federal Court decision in *S&M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717.

[65] If the time period of 12 years runs only from when the chargee decides to issue the Form 16D notice and then only after the failure to remedy the default, as is suggested in the case of *Peh Lai Huat* and *Jigarlal,* the time requirements of 'at least one month or such other alternative period as may be specified in the charge' mentioned in s 253, would have been rendered meaningless and of no effect. If the time period of 12 years does not run from when the breach of the agreement took place whence the right to receive money accrued has been disaffected, a chargee may well decide not to do anything for the next 100 years, and still be in time to enforce the ad rem right of order of sale.

[66] The laws of limitation are intended to protect the rights of all parties concerned. These laws lend certainty and confidence to the enforcement and

safeguarding of rights and remedies and recourse to the courts, preventing abuse through the principle of laches. This was discussed in the Supreme Court decision in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409:

> The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

[67] The Supreme Court further opined that the laws on limitation are 'promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest reipublicae ut sit finis litum that in the interest *of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts'.*

...

...

[72] Going back then to the question that we first posed to the parties, whether s 256 of the National Land Code is substantive or procedural law, we find that this provision must be read together with the other provisions in Part 16 of the National Land Code. And, in so doing, we will find that s 256 is part of adjectival remedial law as is evident from s 253, that states:

> The provisions of this Chapter shall have effect for the purpose of *enabling any chargee to obtain the sale of the land* or lease to which this charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein. (Emphasis added.)

[73] Mohd Zawawi Salleh J (as he then was) in *Tan Sri Khalid Ibrahim v Bank Islam Malaysia Bhd* [2012] 3 CLJ 249 had to deal with the issue of whether ss 56 and 57 of the Central Bank of Malaysia Act 2009 ('Act 701') applied retrospectively. His Lordship felt it apt to deal with that issue in the context of whether these provisions were procedural or substantive in nature and his Lordship relied on the *Law Commission of India*, 193 Report which explained as follows:

> 'Procedural law' is one which deals with the procedure in courts which has to be followed by the parties to seek vindication of their rights. The rights which they seek to vindicate in the court through the said procedure are the substantive rights ...

[74] The definitions of the term 'substantive law' as opposed to 'adjectival or procedural law', which are found in the law dictionaries are of assistance:

The Advanced Law Lexicon by P Ramanatha Aiyar:

> That part of law which creates and defines rights; not adjective law, which defines methods of enforcing rights.

Black's Law Dictionary (6th Ed) p 1429 as cited in *Sia Kim Yoke v Public Prosecutor* [1998] 5 MLJ 658 at p 665:

> That part of law which creates, defines, and regulates rights and duties of parties, as opposed to 'adjective, procedural, or remedial law,' which prescribes method of enforcing the rights or obtaining redress for their invasion: *Allen v Fisher* 574 P 2d 1314. The basic law of rights and duties (contract law, criminal law, tort law, law of wills etc) as opposed to procedural law (law of pleading, law of evidence, law of jurisdiction, etc).

[75] The Federal Court in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 made a similar but firm observation on the distinction between these two terms, 'substantive' and 'procedural' laws when discussing the position of s 17(1) of the Courts of Judicature Act 1964:

> The *most decisive limitation* placed on the powers of the rules committee, and indeed on other rule making authorities, is that they extend to regulating the *'practice and procedure'* of the High Court and other courts for which the rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do not extend into the area of *substantive law.* Clearly, there is a *vital distinction* made between on the one hand, substantive law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by courts of law or any other tribunal seized with jurisdiction to adjudicate on a dispute before it.

[76] Clearly, the statutory provisions have to create, provide or define some right in order to be considered substantive law. It is our respectful view that the terms of s 256 do not meet that criterion. In the first place, Chapter 3 of the National Land Code itself describes the provisions in this Chapter as containing the provisions on the remedy of a sale in respect of charges. And, s 253 fortifies that intent when it states that the 'Purpose and scope of this Chapter' is 'to have effect for the *purpose of enabling* any chargee to obtain the sale of the land or lease to which this charge relates *in the event of a breach* by the chargor *of any of the agreements on his part expressed or implied* therein'.

[77] Sections 254–256 provide for the procedure, method, mechanism, manner or means of enforcing the right for an order of sale. However, the substantive right of the chargee to approach the court for the remedy of an order for sale of the charged land is still dependent on there being a breach of the express or implied agreements. The express agreements are to be found in the charge documents, while the implied agreements are as provided under s 249 of the National Land Code. As expounded by the Federal Court in *S&M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd*, the right to pursue the statutory remedy of sale is triggered by the event of breach or default in the underlying contractual agreement and in the terms of the charge.

[78] Since s 253 clearly refers to a breach which already exists, and that it is this breach which triggers the right of action or cause of action in favour of the chargee bank to enforce the charge, activating the mechanism under the National Land Code cannot mean that the breach which allowed the chargee bank to invoke the mechanism in the first place is avoided. Section 256 merely affords the chargor the opportunity to remedy the breach before the application for an order of judicial sale

may be sought. Once that breach has been remedied, the breach or default ceases and the chargee bank may no longer approach the court for an order of sale. As mentioned earlier, the Federal Court had decided in *Jacob* that the Form 16D Notice is to give the charger sufficient notice before the chargee bank can go to court for an order of sale.

[79] We find further support for this in the view of learned author Judith Sihombing in *National Land Code: A Commentary (2nd Ed)* at p 566:

> The power of sale can be exercised on the breach of any covenant, not only on the breach of the covenant to pay. Thus, breach, of any agreement implied into the charge under ss 249–251 or any express agreements inserted by the parties, will give rise to the right to seek exercise of the power of sale.

[80] In our view, the fact that s 256(2) expressly provides that the application for sale shall be dealt with in accordance with the provisions of any law relating to civil procedure for the sale of land which is for the time being in force, and O 83 is that specific procedural law for the purpose of charges, foreclosures and for sale of land, does not alter the status of s 256 as procedural law in effect. This provision merely provides for the manner and the authority which has been vested with the power to make that order for sale.

[18] Like the facts in *Sivadevi a/p Sivalingam v CIMB Bank Bhd,* the facts in the present appeal concerned an action to enforce a charge of land. The appeal does not concern a recovery of the principal sum of money which is secured by a charge or even an action to recover proceeds of sale of land or a balance sum after a sale. An action to enforce the charge clearly comes within the ambit of s 21(1).

[19] On the strength of *Sivadevi a/p Sivalingam v CIMB Bank Bhd* and for the reasons stated therein, this appeal must be allowed.

[20] In addition, there are some issues raised in the instant appeal that were not argued and considered in the other appeal. We wish to express the view that these other issues do not alter our position insofar as our decision on the interpretation and application of s 21 of the Limitation Act 1953.

[21] We appreciate that in the recent Court of Appeal decision of *Ramley bin Ismail v CIMB Bank Berhad* [2017] MLJU 67, the view was expressed that following *Kandiah Peter v Public Bank Berhad* [1994] 1 MLJ 119 and *CIMB Investment Band Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779, in seeking for an order for sale, no action is actually commenced. This is because those proceedings do not result or terminate in a final judgment or decree. We have set out those observations and determinations earlier in *Sivadevi.* We have no reason to disagree with the views expressed therein as we too, have pointed out that proceedings in respect of an order for a judicial sale or foreclosure

proceedings under O 83 of the Rules of Court 2012 are meant to be summary, simple and speedy. The merits of the case are not determined by the court in such proceedings.

[22] However, as expressed earlier, the concerns of the Supreme Court in *Kandiah Peter* were not raised in the context of the application or otherwise of s 21 of the Limitation Act 1953 to proceedings for a judicial sale or for foreclosure proceedings. Neither was it the issue in the case of *Ramley.* In *Ramley,* the concerns of the court were over the application of the doctrine of res judicata; that because there was no judgment, the doctrine did not operate. It is observed that Jeffrey Tan in *CIMB Investment Bank Bhd* had, inter alia, said that judicial sale proceedings result in the grant or refusal of an order for sale, and not in a judgment or decree. His Lordship nevertheless proceeded to say that 'an order for sale, once granted and unless set aside, is nonetheless a final order', citing *Mui Bank Bhd v Cheam Kim Yu (Beh Sai Mina, Intervener)* [1992] 2 MLJ 642, at p 649. We have no reason to disagree with that decision in *Ramley.*

[23] In any event, while a judgment obtained in a judicial sale proceedings may not have been on the merits so as to attract the operation of the principle of res judicata, that does not render the issue of limitation unavailable. It is our respectful view that the issue of limitation must be considered within the terms of the Limitation Act 1953 and in this case, the terms of s 21, which is the central issue in the present appeal.

[24] The facts in the present appeal fortify the views held in *Sivadevi a/p Sivalingam v CIMB Bank Bhd.* Unlike the facts in that appeal, a judicial sale was commenced by the original bank. In those first proceedings, The Pacific Bank Bhd had not only recognised the breach and default that gave rise to the right to exercise the statutory remedy of order for sale; it had also exercised and acted on the right. That right does not and cannot exist in a vacuum, isolated from the underlying contractual agreements reached between the parties. Even the National Land Code recognises those express agreements in ss 249 and 253. Having recognised the breach and the default that gave rise to the cause of action to enforce the charge by way of an order for sale, the respondent is now estopped from suggesting otherwise.

[25] The order for sale in the present appeal is clearly time-barred under s 21 of the Limitation Act 1953. Given these circumstances, we agree with the appellants that cause to the contrary within the terms of *Low Lee Lian* have amply been shown. The appeal has merit and is accordingly allowed with costs. The decision of the learned judge is therefore set aside.

A *Appeal allowed; High Court decision set aside.*

Reported by Ashok Kumar

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